IN THE

Supreme Court of the United States

October Term, 1952

No. 85

ISIDORE EDELMAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The petitioner, Isidore Edelman, was arrested and charged in a verified complaint with a violation of the provisions of subdivision 5 of Section 647 of the Penal Code of the State of California. The trial began on October 26, 1949, and continued through nine days. The jury found petitioner to be guilty of the offense charged on November 7, 1949. Petitioner's motion for a new trial was denied and he was sentenced to serve 90 days in the City Jail. A notice of appeal was filed; bail on appeal fixed and posted by appellant [R. 1-2; 36]. An Engrossed Statement on Appeal was allowed, settled;

certified and signed by the trial judge on June 18, 1951 [R. 39; 1-26].

On October 18, 1951, the Appellate Department of the Superior Court of Los Angeles County made its order affirming the judgment and order appealed from without written opinion, the cause having been submitted without briefs or argument [R. 54-55]. Thereafter petitioner served notice of motion to recall the remittitur and to vacate the judgment of the Appellate Department of the Superior Court [R. 55-56]. This motion was supported by affidavits [R. 56-57]. The motion was duly made, argued before the Appellate Department of the Superior Court, and, on January 9, 1952, denied [R. 58]. Certiorari was thereafter granted by this court.

I.

The Supreme Court of the United States Should Not Take Jurisdiction to Review a Judgment Where No Opinion Was Delivered by the Highest State Court.

The record and the petition upon which this court granted certiorari show that no opinion was delivered by the Appellate Department of the Superior Court of Los Angeles County [R. 58; Pet. p. 1, line 26]. Said appellate court therefore did not in any way pass upon any federal questions.

The petition recites:

> "On expiration of the time for filing appellant's brief, the appellate court summarily affirmed the judgment and order of the trial court without any briefs or oral argument having been presented on behalf of petitioner." [Pet. for Writ, p. 15, lines 11-15.]

The notice of motion to recall the remittitur recites that "said motion will be made on the ground that said judgment and said issue of the remittitur was occasioned by the inadvertence and mistake of fact of the defendant, etc." [R. 55]. The motion to recall the remittitur and to vacate the judgment was argued, submitted and duly considered by the appellate court and denied [R. 58].

The extraordinary remedy of a recall of a remittitur may be granted where the court lacked jurisdiction to pronounce judgment, or where fraud, imposition on the court, or judicial misapprehension of the facts has resulted in an erroneous judgment, but where none of these circumstances appears, such recall will not be granted for mere errors of law or procedure.

People v. Stone, 93 Cal. App. 2d 858.

The record discloses that petitioner was represented by Leo Gallagher, attorney at law, during the trial commencing on October 25, 1949, and concluding on November 7, 1949 [R. 28-34]. Leo Gallagher was present and represented petitioner in the proceedings which terminated with the pronouncement of judgment on December 12, 1949 [R. 34-35]. The notice of appeal from that judgment was filed by Mr. Gallagher as attorney for defendant [R. 1].

The affidavits in support of the motion to recall the remittitur acknowledges that Leo Gallagher received notice of the setting of the matter for hearing in the Appellate Department of the Superior Court [R. 56].

The order of the Appellate Department of the Superior Court affirming the judgment of conviction indicates that the matter before it was submitted for decision without appearance of counsel or argument [R. 54]. It is there-

fore apparent that the Appellate Department of the Superior Court had not been called upon to or did decide a federal question in any manner whatsoever.

The appellate jurisdiction of the United States Supreme Court over a state court cannot be based upon the supposed denial of a federal right which was not urged in the trial court or called to the attention of or decided by the state appellate court.

Cincinnati, H. O. & T. P. Ry. Co. v. Slate, 216 U. S. 78.

In a recent decision by this court, *Stembridge v. State of Georgia*, 96 L. Ed. (Adv. Ops.), No. 16, page 753, decided May 26, 1952, it was held that where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment and that constitutional questions must first be raised in the trial court. That case was dismissed after the granting of the petition for certiorari.

Petitioner asserts in his petition, page 2, line 7, to page 3, line 15, that he properly raised the constitutional questions in the trial and appellate courts by making exceptions to the evidence and by way of motion for new trial, and as one of the grounds of appeal presented. The Engrossed Statement on Appeal sets forth a summary of the evidence of the trial with no showing of any rulings of the court or of any objections or exceptions made [R. 1-26]. The docket entries of the trial show that defendant's motion for new trial was made on November 14, 1949, and denied on December 12, 1949 [R. 34-35]. It is noted that no motion in arrest of judgment appears to have been made in the trial court. Nowhere does the

record show what grounds were urged in making the motion for a new trial. Where the record on appeal simply shows that a motion for new trial was made and denied, but fails to disclose what matters were argued, under such circumstances the order will be affirmed on appeal. (*People v. Beatcher*, 136 Cal. App. 337; *People v. Serpa*, 67 Cal. App. 2d 327.) A ground of appeal does not in any way call a court's attention to or require a ruling as to its merit. As no briefs were presented or any argument made in the appellate court, the claimed federal questions appear for the first time in the Petition for Writ of Certiorari.

The petition further discloses that at the time of its filing, petitioner was committed in jail [Pet. p. 7, lines 8-12]. The remedy of habeas corpus was available to him to test the constitutional questions now raised. There is no assertion that he sought or was denied such remedy in the state courts.

The judgment of the Appellate Department of the Superior Court clearly indicates that no action was taken nor was that judgment based upon the question of any federal constitutional right [R. 54].

Respondent fails to see how the Appellate Department "in effect" held contrary to any decision of this court where they did not have the benefit of briefs or argument raising any question whatever.

Where no appearance is made on the date set for argument and no briefs have been filed, there is no duty on an appellate court to search a record and consider possible contentions for an appellant.

People v. Giduey, 10 Cal. 2d 138;
People v. Dorsey, 78 Cal. App. 2d 804.

Where an appellant files no briefs and no appearance is made for him when the case is called for hearing, the judgment of conviction is affirmed.

People v. Sukovitzen, 67 Cal. App. 2d 901.

II.

Subdivision 5 of Section 647 of the Penal Code of the State of California Is Constitutional.

Petitioner asserts in his Petition for Writ of Certiorari that the appellate court has, in effect, decided that the statute under which he was convicted was not so vague, indefinite and uncertain as to deprive him of his liberty without due process of law. Assuming solely for the purpose of argument that this point is properly presented, it is submitted that subdivision 5 of Section 647 of the Penal Code is constitutional. This section provides:

> "Every idle, or lewd, or dissolute person, or associate of known thieves, is a vagrant and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or both such fine and imprisonment."

The District Court of Appeal of the State of California, in the case of *People v. Babb*, 103 Cal. App. 2d 326, held this subdivision and section to be constitutional as against a contention that it failed to state a public offense. That court held the terms "lewd" and "dissolute" to be terms often used interchangeably; that each applies to the unlawful indulgence in lust, whether in public or private; that "lewd" was defined to mean lustful, libidinous, lascivious and unchaste; "dissolute" to mean loose in morals and conduct, wanton, lewd and debauched.

In the case of *State v. Harlow*, 174 Wash. 227, the court held a similarly worded statute to be constitutional. That court said the words "lewd," "disorderly" and "dissolute" are words of common and general use, and are easily understood by men and women of average intelligence; that it doubted whether definition could make them clearer.

In passing upon the subdivision and section here involved, the District Court of Appeal of California in the case of *In re McCue*, 7 Cal. App. 765, answered the contention that there had been a violation of due process in that the petitioner was charged with being an idle, lewd and dissolute person, and that he had not been sufficiently advised of the character of his offense, by stating:

> "The constitutional right of due process of law will not render impossible laws which are generally admitted to be essential to the safety and well being of society . . . To say that the Legislature must specify the many evil and corrupt practices which constitute one a lewd or dissolute person would often render the enforcement of a police regulation in connection therewith impossible, and this without considering the indelicacy and impropriety of expression which would often be necessary."

In the case of *People v. Scott*, 113 Cal. App. (Supp.) 778, the Appellate Department of the Superior Court of Los Angeles County stated that where the legislature of a state has taken upon itself the regulation of vagrants by statute, the words therein must bear the interpretation thereby made or intended; that "dissolute" was defined to mean loosed from restraint, recklessly abandoned to sensual pleasures, profligate, wanton, lewd and debauched.

The Appellate Department of the Superior Court of Los Angeles County has held this subdivision and section to be constitutional against challenges similar to those set forth in the petition herein, in the cases of *People v. Elliott*, Cr. A. 2446; *People v. Nichols*, Cr. A. 2622, and *People v. Dragna*, Cr. A. 2819.

The requirements of reasonable certainty do not preclude the ordinary terms to express ideas which find adequate interpretation in common use and understanding.

Sproules v. Binford, 286 U. S. 374, 393.

III.

Decisions of the Highest Court of the State on Matters of State Law Are Controlling.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the United States Supreme Court.

Huddleston v. Dwyer, 322 U. S. 232, 236.

Until such time as the case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.

Vanderbach v. Owens Illinois Glass Co., 311 U. S. 538, 543.

The decisions of the California courts upholding the constitutionality of subdivision 5 of Section 647 of the Penal Code of California, set forth under Point II hereof, should be controlling upon this court as applied to the laws of the State of California.

IV.

Petitioner Was Not Denied Due Process of Law in the State Courts.

Petitioner asserts in his petition that he was denied due process of law in the appellate proceedings [Pet. p. 16, line 3]. He also asserts that there are no cases to be found to support that statement [Pet. p. 15, lines 21-25; p. 16, lines 18-21]. The docket entries of the trial in the Municipal Court proceedings disclose that petitioner was represented in all stages of that proceeding [R. 27-35].

The Revised Appellate Department Rules provide for notice of hearing as follows:

> "Rule 3. Calendars and notice of hearing.
>
> (a) [Calendar.] The clerk of the court, unless otherwise ordered, shall place upon the calendar for hearing at each regular session all appeals of which such department has jurisdiction, wherein the records on appeal were filed in civil cases not less than 17 days prior to the date of the session, and in criminal cases not less than 12 days prior to the date of the session. Any appeal may, by order of the presiding judge or the department, be placed on the calendar for hearing at any session of the department.
>
> (b) [Notice of hearing.] As soon as the record on appeal in any case is filed, the clerk shall mail to the attorney appearing of record for each party, or if any party has appeared without attorney, then to such party personally, at the address of such attorney, or party appearing in the record, a notice stating that said record has been filed and giving the date at which the appeal will be heard and the dates when

each party must file briefs, as provided in these rules. Failure of the clerk to mail any such notice shall not affect the jurisdiction of the Appellate Department."

The affidavit of Leo Gallagher, filed in support of the motion to recall remittitur, shows that he received a post card advising him that the matter had been set for hearing in the Appellate Department of the Superior Court [R. 56]. As heretofore pointed out, the name of Leo Gallagher appeared on the Notice of Appeal filed, and from the affidavit heretofore mentioned he was duly notified of the time set for hearing [R. 1]. There appears no action by any court which tended to deny petitioner due process of law at any stage of these proceedings. If there was a failure of representation in the appellate court it was caused by petitioner's act of changing counsel and by reason of his trial counsel's failure to forward the notice of hearing to the substituted counsel. From the record before the appellate court, Leo Gallagher appeared to be the attorney of record for petitioner.

Notice and hearing together with a legally competent tribunal having jurisdiction of the case constitute basic elements of the constitutional requirement of due process.

Powell v. Alabama, 287 U. S. 45.

There is no requirement that an appellate court must await the appearance of an appellant in order that it may decide a case regularly before it or investigate the reason for such non-appearance where notice is mailed in accordance with the rules.

V.
Conclusion.

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not heretofore determined by this court.

There appears in this case no reason, either in law or in good conscience, why the petition should be heard or granted without first having the highest court of the State of California express its opinion on the questions here raised. The matter should be dismissed.

Respectfully submitted,

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Attorneys for Respondent, the People of the State of California.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of August, A. D. 1952.

8-25-52—60